IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 37
3059494 and 3059495

	BETWEEN	CHRISTOPHER BENTERMAN Applicant in 3059494
	AND	DUANE CURD Applicant in 3059495
	AND	NEW ZEALAND STEEL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Garry Pollack, counsel for the Applicants Carter Pearce, counsel for the Respondent
Investigation Meeting:	5 and 6 November 2019
Determination:	30 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves a dispute regarding the rate of "consolidated conditions payment" (CCP) made to two trade electricians employed by New Zealand Steel Limited (NZSL) at its Glenbrook plant. The CCP is an allowance paid under the terms of a Collective Agreement (CA) between NZSL and E tū and two other unions.

[2] The dispute arose because NZSL said Christopher Benterman, an electrician, and Duane Curd, an instrument technician, had been paid a higher CCP rate than they were entitled to get under the terms of the CA. The two men, who are E tū members, said their CCP rate was agreed with them by a previous manager in 2013. Mr Curd's CCP was paid to him at this particular rate from May 2013 to September 2018 while Mr Benterman received it only from June 2015 to September 2018.

[3] In June 2017 NZSL gave Mr Benterman and Mr Curd six months' notice their CCP would be changed to a lower rate that the company said was the appropriate amount for them under the relevant term of the CA. Implementation of that change was delayed while a wider review of CCP payments in their department was undertaken. In June 2018 the NZSL manager then responsible for the review confirmed the company's view that the lower CCP rate applied to the work of Mr Benterman and Mr Curd. They were advised that change would take effect from 1 July 2018. As a result of queries made by their union representatives NZSL looked at this decision again but, in late August, confirmed its position. From 10 September 2018 NZSL applied the change to the pay of Mr Benterman and Mr Curd.

[4] E tū representatives at the work site disputed NZSL's interpretation of the CCP term and opposed the change going ahead. They said another clause in the CA, setting out how disputes about changes to "existing custom and practice" were to be resolved, applied to this situation. This meant, they said, the change should not have been made until the dispute about payments to Mr Benterman and Mr Curd was resolved, either by the Employment Relations Authority or a nominated mediation panel.

[5] Statements of problem lodged by Mr Curd and Mr Benterman, with the assistance of their union, asked the Authority to find NZSL had breached their terms of employment by reducing their CCP rate, either by breaching the express term providing for those payments or by breaching the "long established custom" of paying them at the higher rate and by going ahead with the change before resolving the matter under the CA clause about settlement of disputes. They asked the Authority to find they were unjustifiably disadvantaged by such breaches and to award them compensation. They also claimed a penalty for those alleged breaches but that claim was withdrawn during the Authority investigation meeting.

[6] NZSL, in reply to the claims of Mr Benterman and Mr Curd, accepted there was a dispute regarding the interpretation and application of the CA but said it was now paying the correct rate and no "long established custom" was breached in making the change, so the dispute settlement clause did not apply.

The Authority's investigation

[7] Five witnesses provided written statements and gave oral evidence, under oath or affirmation, during the Authority' investigation meeting about this matter:

- Mr Benterman;
- Mr Curd;
- Brad Stark;
- Ewan-Xan Macaskill; and
- Mark Palmer.

[8] Mr Stark was NZSL's Centralised Maintenance Group (CMG) superintendent from January 2013 to 2015. He had arranged for Mr Benterman and Mr Curd to transfer to the centralised Utilities Department trades team in May 2013 after talking with them about the CCP rate they would be paid.

[9] Mr Macaskill was the Utilities Department superintendent from May 2018. He made the decisions in June and August 2018 to confirm NZSL would reduce the CCP rates it paid to Mr Benterman and Mr Curd.

[10] Mr Palmer is an E tū organiser. He was previously an NZSL employee for many years and had served as the union's site convenor for six years. He was involved in discussions in 2017 and 2018 with NZSL representatives about proposed changes to the CCP rates for Mr Benterman and Mr Curd.

[11] At the end of the investigation meeting the parties' representatives gave written and oral closing submissions on the issues for resolution.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[13] The issues of fact and interpretation requiring determination were:

(i) What terms did Mr Stark agree with Mr Curd and Mr Benterman in May 2013, particularly regarding the duration and review of CCP rates they were to be paid?

(ii) How did those agreed terms relate to clause 94.1 of the CA about the CCP for Electrical Trades employees?

(iii) Did those additional terms comply with the requirements of s 61 of the Act, particularly regarding consistency with the applicable CA?

(iv) Did NZSL have to follow the procedure set in clause 59.2 of the CA before changing the pay of Mr Benterman and Mr Curd?

(v) What outcome is reached and what orders should be made, if any?

(vi) Should either party contribute to the costs of representation of the other party?

The collective agreement, the Act and legal principles on interpretation

[14] The following terms from the current CA, also found in earlier collective agreements that have applied since 2013, were relevant:

> **4 Completeness**
>
> 4.1 No other agreements, whether in writing or not, shall be binding on the parties to this Agreement unless it is included in its entirety, or is given binding status by specific reference in this CA.
>
> **5 Variation**
>
> 5.1 The terms and conditions of employment as laid out in this CA may be varied by mutual agreement in accordance with the variation procedure set out in the Employment Agreements section of this CA.
>
> **6 Integrity**
>
> **6.1** It is recognised that the updating of this Collective Agreement may have resulted in errors or omissions. Where such errors or omissions are identified, it is agreed that, after consultation with the parties to this Collective Agreement, any necessary corrections may be entered into the Collective Agreement during its term as a Variations of Agreement.
>
> …
>
> **9 Agreement Variation Procedure**
>
> 9.1 Terms and conditions of employment as laid out in this CA may be varied by agreement between management and employee representatives.
>
> 9.2 Provided those employees whose conditions of employment are to be varied agreed to the variation the relevant clause or clauses of the CA shall be varied accordingly.

10 Variation process

10.1 Site wide issues should be discussed between the Employee Relations Manager, Area Manager and Site Committee Chairperson.

10.2 All local issues should be discussed between the manager, local manager, local site delegate and employees concerned, with regard being given to any possible effects on other areas.

10.3 The agreed variation shall be recorded in writing and signed by the manager, delegate and those employees directly affected.

10.4 Before signing a variation a manager shall ensure that he/she had the approval of the Senior Management Team. …

…

59 Settlement of disputes

59.1 Where an employee (or any number of employees) has a dispute with management about the interpretation, application or operation of this Collective Agreement (or any of its supplementary documents) the matter will be dealt with in accordance with the provisions of the Code of Conduct.

59.2 Where either party interprets the agreement in a manner differing from existing custom and practice, and as a result wished to implement changes to existing custom and practice, no such changes may be implemented until either:

1) Agreement is reached on the changes; or

2) The matter is determined through the Employment Relations Authority or resolved as follows:

During the term of this agreement, the union may refer up to six matters to a nominated panel of mediators who will have the authority to make a final and binding decision if the parties are unable to reach agreement. Participation in this process will exclude legal (lawyers) representation.

…

94.1 CONSOLIDATED CONDITIONS PAYMENTS – OTHER EMPLOYEES

94.1.1 Unless otherwise specified the payments set out in this schedule are payable in lieu of all other special payments and are payable for all hours worked.

94.1.2 **Electrical trades**

Description	Pay code	1/07/18-30/06/19	1/07/19-30/06/20	1/07/20-30/06/21
Primary Plants ECP4	2703	$3.987	$4.086	$4.168
Iron Plant ECP3	2704	$4.275	$4.381	$4.469
WNH/Central Services/Central Electrical Workshop; Central Instruments Workshop, & **Area not specified ECP2**	2702	$2.169	$2.224	$2.268
Rolling Mills, Finishing Plants ECP5	2707	$2.745	$2.813	$2.87

Steel Plant ECP 1	2701	$3.67	$3.762	$3.837

Note: Electrical tradespeople will be paid for each hour worked the consolidated conditions payment from the schedule above applicable to the plant/department where they are permanently employed. The ECP1 and ECP3 shall only be paid to all employees normally attracting ECP2 if a minimum of four hours or more in any day is spent in Iron Plant and/or Steel plant work areas, in which case the employee will then be paid for hours worked in the area on an hourly basis.

[15] Section 61 of the Act was also relevant. It allowed for NZSL and Mr Benterman and Mr Curd to agree to additional terms and conditions that were different to those in the CA, provided any additions were "mutually agreed" and "not inconsistent" with the CA's terms:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**
>
> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are —
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.

[16] Interpretation of employment agreements is guided by general principles of contract interpretation, as explained by the Supreme Court in the following way:[1]

> [60] ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
> ...
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious

[1] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 (footnotes omitted), as referred to in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111 at [71]–[77].

> one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

What was agreed in May 2013?

[17] This determination required findings on the nature and scope of an agreement Mr Stark reached with Mr Benterman and Mr Curd in May 2013. Those findings, made below, have been reached from an assessment of their evidence about what was said and agreed at the time and from consideration of both the context and what may be ascertained from the conduct of Mr Benterman, Mr Curd and various NZSL representatives in the following years since then. The finding is made on the balance of probabilities, of what more likely than not happened, as assessed objectively, that is as by a reasonable observer informed as best as can be of the relevant information and circumstances.

[18] Mr Stark's evidence explained that he approached Mr Benterman and Mr Curd about joining a dedicated trades team in the Utilities Department. He had worked with both men earlier in his career at NZSL, before progressing through to supervisorial and management roles, including having worked as an apprentice to Mr Benterman.

[19] Creating this dedicated team was part of changes Mr Stark was implementing as the newly-appointed CMG superintendent. Trades staff who maintained various equipment in three different plants on the Glenbrook site were to no longer be based at those individual plants but, instead, were to work from a centralised base and be scheduled to work in the different plants as required. His plan aimed to improve service of the equipment in those plants as well as provide more varied work for the trades staff as they worked on different equipment around different parts of the site.

[20] At the time Mr Curd worked in the Iron Plant, receiving the CCP rate described as ECP3 in the CA. Mr Benterman had previously worked in the Iron Plant but, at the time of Mr Stark's approach, was working in the Finishing Plant, which was paid the CCP rate described as ECP5. Both those CCP rates were higher than the ECP2 rate set in the CA for "Central Services" (which was a trades department that had operated some years previous) and for any "area not specified".

[21] When Mr Curd and Mr Benterman told Mr Stark they were interested in accepting his proposal of moving from their plant-based roles to join the centralised

Utilities Department trades team, they asked various questions about how the team would operate.

[22] All three men agreed that Mr Benterman and Mr Curd had asked about what CCP they would get as part of the move. They disagreed about what answer was given by Mr Stark. He said he told them they would continue to receive the payments they were currently getting, at the rate applicable for the plant they worked in at that time, but at a later date the company would need to review the rate for all tradespeople in the CMG. He said he told them that review would align the payments for the Utilities team with the rate paid to the previous Central Services team, that is the lower ECP2 rate. When they asked when that review might occur, according to Mr Stark, he replied that "it was not a priority for me right now".

[23] Mr Stark, in his oral evidence, said he had given them a choice of accepting that arrangement, and starting work in the team in the following week, or that they could seek more formal clarification of what would happen with their CCP payments. He explained this meant they could have spoken to their union representatives and he could have gone to a company human resources advisor and "we could sit down in a more formal sense and seek clarity from people who were the right people to give that level of detail". He said he told them "one option is you can start doing it and we can look at that later".

[24] Mr Stark said Mr Curd and Mr Benterman accepted that latter option, started work in the team and he later told their team leader, Marty Huggins, about the arrangement for their pay. He said Mr Huggins had come and "asked me for clarity about it and I said there is nothing to change, it just stays as it is".

[25] No paperwork was completed to record Mr Stark's authorisation that Mr Curd and Mr Benterman were to continue to receive the CCP payments at the rate applicable to the separate plants in which they had been previously based. As Mr Stark explained it, he did not provide a 'change notice' to the company payroll office, that is a company form recording changes to an employee's work conditions such as their department, work class and allowances. Neither was any process of the type set out in clause 10 of the CA followed to record and approve any variation in the application of the CA clause on CCP payments as far as it applied to Mr Benterman and Mr Curd.

[26] Mr Curd and Mr Benterman were adamant in their evidence that Mr Stark had not mentioned their CCP rates would be subject to any review. Rather they said he told them only that they could continue to "book" the rate they were currently receiving, that is to continue to claim it as part of their regular pay.

[27] Mr Benterman's written evidence said he was told he could claim the ECP3 and he had done so from when he began work in the Utilities Department trades team in May 2013. This was not correct. He was not paid the ECP3 rate until June 2015 and he explained why in his oral evidence.

[28] Mr Benterman said Mr Stark had told him in May 2013 that he would keep getting his current CCP rate but could claim a higher rate for hours he worked in areas that attracted a higher payment. In his case this meant, he said, he could claim the higher ECP3 rate for time spent working in the Iron Plant, because that was higher than the ECP5 rate he received for work in the Finishing Plant and other areas on the site. However Mr Benterman said he went to the site pay office on several occasions in the following years to arrange adjustments to his pay because the CCP had not been paid to him for hours he had claimed at the higher rates. He had sought help in doing so from his team leader, Mr Huggins, and Mr Huggins' successor, Steve Waldek. In June 2015 Mr Waldek submitted an Employee Change Notice to the pay office which said Mr Benterman's "job class" was to change from "Finishing Plant/ECP5" to "Iron Plant/ECP 3". Thereafter Mr Benterman was paid the ECP3 rate for all hours worked, regardless of which plant he worked in. He said he had not seen, until the Authority's investigation more than four years later, the form that Mr Waldek had submitted.

Credibility?

[29] NZSL submitted the conflict in the evidence over what was agreed should be resolved on the basis that Mr Stark's evidence was comparatively more credible because, unlike Mr Benterman, he had not changed his evidence and had nothing personally to gain or lose in the proceeding. Neither aspect of that proposition was compelling.

[30] In his discussions with Mr Benterman and Mr Curd in May 2013 Mr Stark was in a position of responsibility in the company. He had the apparent authority to make binding arrangements with the two employees about the terms of which they could transfer to the new Utilities trades team. He offered terms to them regarding payment

of their CCP. They accepted those terms. He did not follow the CA procedures for recording or approval of terms that were different from the CA but in offering, as he undisputedly did, that they could receive CCP rates that were not subject to the limitations in the relevant clause, he was offering better terms. When, as according to his own evidence, the two men asked about having those arrangements formalised, he discouraged them from doing so as it would delay their transfer and, effectively, asked them to trust him. He was in a more powerful position than them in making that arrangement and they relied on what they understood he had agreed.

[31] He did not follow the company's formal procedures for changes to be recorded and approved. Instead he made what was really a 'side deal' with two employees he knew well for them to be paid at rates superior to those provided by the ordinary application of the CA terms on CCP for electrical trades employees. Some five or so years later this caused NZSL some difficulty in being able to respond convincingly to the claims from Mr Curd and Mr Benterman. Mr Stark remains a manager elsewhere in NZSL's business. The outcome of a situation that arose from a shortcoming in how he carried out part of his role as CMG superintendent, to the company's eventual inconvenience, has to be seen as of at least some personal reputational interest to him.

[32] Neither was the credibility of Mr Benterman's evidence negated or reduced by frankly admitting in his oral evidence that a key part of his written evidence was wrong.

Context and subsequent conduct

[33] Arguments about relative credibility did not really help resolve the largely 'he said-he said' contest of evidence. Rather, three factors favoured the description given by Mr Benterman and Mr Curd on the central issue of whether Mr Stark had said their CCP rates would be subject to later review and reduction.

[34] Firstly, the context in which Mr Stark made his arrangements with Mr Curd and Mr Benterman was not likely to have included details about an eventual review that were as firm as he later came to describe them. Mr Stark's evidence that he was working under some pressure to complete staffing changes he was steering in his new role as superintendent. This was apparent from his own evidence of discouraging Mr Benterman and Mr Curd from delaying their move to the new team by pressing for more formal confirmation of the arrangements.

[35] Secondly, the continuation of their CCP rates were clearly of importance to Mr Benterman and Mr Curd at the time that Mr Stark offered them the opportunity to change to the new team. It was unlikely that they would so readily have accepted his offer if Mr Stark had been as firm as he later claimed to have been about that those rates being subject to later review and reduction.

[36] Thirdly, the subsequent conduct of Mr Stark, Mr Benterman and Mr Curd did not indicate the CCP rates were subject to review and reduction to the ECP2 level. Mr Stark continued in his role as CMG superintendent for almost two full years following the change without any attempt to initiate such a review.

[37] There was also no evidence that actions of Mr Stark's successors in the CMG superintendent role, initially Peter Whitehead and later Mr Macaskill, were in any way informed or guided by any knowledge of any term regarding review supposedly agreed with Mr Benterman and Mr Curd. Rather Mr Whitehead, who told them of a change to the ECP2 rate in June 2017, and Mr Macaskill, who advised of a decision to the same effect in June 2018, each appeared to have reached those views solely by comparing the rates actually paid with their reading of how the CA term should be applied to the roles of Mr Benterman and Mr Curd. Mr Macaskill's evidence was that the first he heard of an alleged agreement with Mr Stark was when Mr Benterman and Mr Curd lodged their statements in the Authority, which was in April 2019. He had never spoken to Mr Stark at any time before then about the CCP payments to them.

[38] Against that background, and on the balance of probabilities, the terms agreed by Mr Stark with Mr Benterman and Mr Curd did not include a reference to a later review and potential reduction to the level of CCP applicable under the CA term to staff described as working in an "area not specified", that is the ECP2 rate. Those terms did not guarantee that their wages could not change, or potentially ever be reduced as a result of other reviews or changes in the business, but there was no agreed oral term of the type and certainty later asserted by Mr Stark. Mr Whitehead and Mr Macaskill, in their later actions to make changes, did not seek to rely on such a term. Their later actions had to be assessed on the different grounds they advanced for them at the time and not a supposed agreed term to that effect with Mr Stark.

Relationship with terms of the CA

[39] In light of those findings about the nature and scope of the oral terms, the next question for resolution was the relationship of those terms with the applicable terms of the CA.

[40] An ordinary and natural reading of clause 94.1 plainly does not provide for Mr Benterman and Mr Curd to be paid the CCP at the rate of ECP3 for all hours they worked, regardless of which plant they worked in. Their work fell within the scope of the phrase "area not specified" used in clause 94.1.2. To be entitled to payment at the ECP3 rate on any one day, they would need to have met the requirements set in the note to that clause to have worked a minimum of four hours in the Iron Plant that day. Whatever entitlement they had to the ECP3 rate therefore arose from an individual or personal term of employment, not the application and operation of the express provision in the CA.

[41] Neither had the payments consistently made to them at that ECP3 rate, since May 2013 for Mr Curd and from June 2015 for Mr Benterman, become a term arising from custom and practice. It was not a sufficiently certain and notorious practice in the industry or the workplace for those higher payments to have become, in effect, an implied term for anyone doing that work.[2] Rather, as accepted in their closing submissions, it was an individual term, particular to and agreed with Mr Benterman and Mr Curd.

Requirements of s 61 of the Act

[42] Such a term, different and better than that provided on the ordinary reading of clause 94.1 of the CA, did have to comply with the requirements of s 61 of the Act in order to be lawful. NZSL submitted that the parties had not mutually agreed that Mr Benterman and Mr Curd would get the ECP3 rate "and an agreement or side deal to that effect would be inconsistent with the [CA]".

"Mutually agreed"?

[43] On the findings already made in this determination, the arrangement Mr Stark offered and Mr Benterman and Mr Curd accepted did meet the s 61(1)(a) requirement of having been "mutually agreed" by the employee and the employer. Mr Stark had the

[2] *Edminstin v Sanford Limited* [2017] NZEmpC 70 at [40]-[43].

apparent authority to have agreed those terms and NZSL's eventual argument, looking at its case overall, was not that the payments could never have legitimately been made. Rather, although its argument was not accepted, NZSL's defence relied on the notion, from evidence given by Mr Stark, that those terms had included a further provision that the payments at that level were "for the time being" and subject to review "at some point" that could reduce the payment.

"Not inconsistent"?

[44] The question then turned to whether the CCP payment arrangement, as it has been found to have been made, was "inconsistent with the terms and conditions in the collective agreement". This involved two points – whether a superior provision was inconsistent and whether failure to have the agreed term recorded and approved as a variation made any difference to its effect.

[45] A Court of Appeal decision, made under earlier legislation, held that the section equivalent to the present Act's s 61 "does not apply if the contractual provision is more favourable" in an agreement that specifies minimum rates of pay.[3] The Employment Court has found that principle continued to apply under the present legislation so that there is "usually no inconsistency" if an additional term is simply more favourable to the employee than the CA term.[4]

[46] In this case the CA is a 'minimum rate' document – setting the least that NZSL must pay, not the maximum. Taking the phrase 'inconsistent with' to mean "not compatible or in keeping with",[5] the individual term agreed with Mr Benterman and Mr Curd was not so different as to be no longer compatible with the substance of the CA term, which provided for additional payments for work in the various plants across the site.

[47] Failure to have the agreed term recorded and approved did however appear to be inconsistent with the arrangements intended by clauses 4, 5, 9 and 10 of the CA. Those clauses were plainly for the purpose of avoiding the difficulties caused by undocumented arrangements as found in the present case. However, as became

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[3] *NZ Meat Processors IUOW v Alliance Freezing Company (Southland) Ltd* (1990) ERNZ Sel Cases 834, at 841.
[4] *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd* [2006] ERNZ 749 at [30].
[5] Concise Oxford English Dictionary (11th edition, Oxford University Press, 2004).

apparent during the course of the oral evidence in this investigation, there were some instances where agreed changes to terms and conditions for workers at the Glenbrook site were recorded in writing and approved in the way contemplated by those CA clauses but also other instances where, for unrecorded and unknown reasons, payments were made to some employees on a wider basis than would seem to be warranted from reading the plain words of the relevant CA clause. Against that background, and because it was Mr Stark as the responsible NZSL manager at the time who had not arranged for recording and formal written approval of the change he agreed with Mr Benterman and Mr Curd, the term for higher payments could not fairly be said to be inconsistent with those clauses.

Interpretation and application of clause 59

[48] The statements of problem lodged by Mr Benterman and Mr Curd asked the Authority to declare that "at the very least NZSL was obliged to follow the procedures outlined in the CA in relation to maintaining custom and practice and the status quo in the event of a disagreement until such time as the [Authority] had determined the matter". This referred to the provisions of clause 59.2 of the CA.

[49] Their position was that as NZSL, through the reviews conducted by Mr Whitehead and Mr Macaskill in 2017 and 2018, came to interpret and then sought to apply the CA term on CCP payments in a way that differed from the existing practice of paying them more than the term provided, no change to those payments could be implemented unless agreement was reached or the dispute resolution procedure in clause 59.2 was followed. They said the status quo, of paying them higher rates, must continue meanwhile. As NZSL had gone ahead and made the change despite the issue being in dispute, they said NZSL had breached the requirements of clause 59.2.

[50] NZSL's reply to this claim had not directly addressed that claim, focussing instead on its argument that the company had not breached the CA by paying Mr Benterman and Mr Curd the ECP2 rate as that was the correct CCP rate prescribed in the CA. It said "payments made in error to two employees do not amount to 'custom and practice'".

[51] However, in closing submissions, NZSL submitted that whatever arrangement had been made with Mr Benterman and Mr Curd, even if found to have become an implied term of their employment, did not meet the definition of custom and practice

and, therefore, did not 'trigger' the requirements of clause 59.2. It said the clause could not be invoked where there was just a difference between the parties over "the ways things are being done right now" and what the CA says. Otherwise, NZSL submitted, the clause would become "a strait jacket" preventing compliance with the CA as any time one party identified something occurring that appeared to conflict with a term of the CA, the other party could claim this was 'custom and practice' and insist nothing was done until the Authority resolved the matter.

[52] The following questions arose for resolution on this point. Firstly, what did the phrase 'custom and practice' mean in clause 59.2? Secondly, how should the clause be read and applied in conjunction with clause 59.1 that provided for any employee's "dispute with management" about interpretation and operation of the CA to "be dealt with in accordance with the provisions of the Code of Conduct"?

The phrase 'custom and practice' in clause 59.2

[53] There was no evidence on the history of clause 59.2. It had to be interpreted objectively, according to its natural and ordinary meaning in the context of the other terms of the CA and the employment relationship.

[54] NZSL submitted that 'custom and practice' was a term of art with a legal meaning, not an everyday phrase. This is correct in the sense that it was applied earlier in this determination regarding the nature and scope of the terms agreed with Mr Benterman and Mr Curd. In the formal judicial or quasi-judicial context of legal proceedings the phrase has a specific meaning derived from legal principle and case law. However, its use in clause 59.2 is for the purpose of guiding workers, managers, human resource advisors and union representatives in their dealings in an everyday industrial context. In that context those words in that particular clause have ordinary and natural meanings that are not as narrow as a legal term of art. The words 'custom' and 'practice' do simply mean the way things are usually done and have been done.

[55] If the interpretation of those words that NZSL advocated was followed, the clause would be ineffective for practical purposes. Use of the clause would always be subject to a prior, and inevitably circular, legal argument about whether the existing manner of interpretation of the CA met a legal definition of being 'custom and practice'. The parties cannot have intended the clause to have been of no practical benefit.

[56] In the context of the agreement and the employment relationship, the clause was clearly intended as a means of protecting both parties from unilateral change by the other party. It was a fetter on both the company and union members. Its emphasis on agreement before change was consistent with other CA clauses regarding consultation and variation of terms and with the statutory obligations of good faith.

[57] The Authority's interpretation of the clause could not be moderated on the basis of NZSL's submission that there were other instances, referred to in the evidence heard during the investigation, of employees being paid inconsistently with the CA and, if the union's view of the clause was accepted, those instances would be impossible to resolve and would be "a charter for disputation and strife". Rather, operation of the clause in such instances would enable the parties, if they could not agree, to have their difference resolved by application to the Authority, as the Act allows, or by their agreed alternative of a nominated panel of mediators.

[58] Accordingly, the question of whether the arrangement with Mr Benterman and Mr Curd met this broad and practical interpretation of the phrase was appropriately resolved in favour of the approach advanced by their union representatives.

Application of clause 59.1

[59] The circumstances of this case did not fit solely within the scope of clause 59.1. It was a dispute by some employees about operation of the agreement but, given it also concerned unwritten arrangements, was not solely to do with "this Collective Agreement (or any of its supplementary documents)".

[60] The effect of this difference in the scope of clauses 59.1 and 59.2 concerns the steps that have to be followed to try and resolve the dispute. Clause 59.1 refers to a Code of Conduct. The Code is a document, dated 1994, that includes an "internal complaints resolution process" for "resolving personal grievances … and interpretation disputes". A flow chart in the Code shows steps for such issues to progress through various levels, from a particular plant or work area up to, eventually, site managers and union officials. Unresolved issues can then be referred to the "relevant external procedure", including the procedure for referring disputes to the Authority under the Act.

[61] The key difference between the procedures set in clauses 59.1 and 59.2 is what happens while the parties seek to resolve their differences over interpretation. Under clause 59.2 no changes to existing custom and practice may be implemented until agreement is reached or, if the parties are unable to reach agreement, the Authority or a nominated panel of mediators make a final and binding decision.

[62] As the circumstances of this particular matter involving Mr Benterman and Mr Curd were within the scope of the broad, practical interpretation given to clause 59.2, NZSL should not have implemented the change to its existing practice regarding their CCP rates until the matter was determined by the Authority.

Outcome and orders

[63] As a result of the findings made in this determination, Mr Benterman and Mr Curd have established that NZSL breached individual terms of their employment and breached the CA by proceeding to implement changes to their pay before following and completing the procedure for resolution set in clause 59.2. As well as resolving the dispute about interpretation and operation of their employment agreements, the findings establish their employment conditions were affected to their disadvantage by unjustifiable action by NZSL, so Mr Benterman and Mr Curd also had a personal grievance.

[64] Their statements of problem had sought compensation for stress and humiliation resulting from NZSL's actions. Their closing submissions said, in the event of a finding of disadvantage, they were seeking to "be restituted for their losses and that the allowance and recognition of their conditions of employment be continued until such time as they agree otherwise".

[65] Both men gave some limited evidence in support of any prospect of compensation for distress resulting from the change imposed by NZSL. Mr Benterman's written witness statement said he was "quite upset" by the change to his allowance. Mr Curd's statement said loss of the allowance had a "quite serious and detrimental effect" on him financially and emotionally. Their oral evidence did not elaborate in any significant way on the factors that supported settling their disadvantage grievance by exercising the discretion to order payments to them of compensation for humiliation, loss of dignity and injury to feelings.

[66] Rather, the appropriate and meaningful remedy was to order NZSL to:

(i) reinstate payment of the CCP allowance to Mr Benterman and Mr Curd at the previously applied ECP3 rate, from the next pay period after the issue of this determination; and

(ii) reimburse Mr Benterman and Mr Curd for money lost as a result of the grievance.[6]

[67] The loss is the difference between what they were actually paid as CCP payments from 10 September 2018 and what they would have been paid if paid ECP3 for all those hours. The period for the assessment of loss is from 10 September 2018 until the date payment is made. NZSL must calculate the amount due and pay it within 56 days of the date of this determination. NZSL must also pay Mr Benterman and Mr Curd interest on the amount due, from 10 September 2018 until the date payment is made.[7] The interest is to be calculated using the Civil Debt Interest Calculator.[8]

Costs

[68] Costs are reserved. If there is an issue as to costs that cannot be resolved by the parties, the applicants may lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum NZSL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur
Member of the Employment Relations Authority

[6] Employment Relations Act 2000, s 123(1)(b).
[7] Employment Relations Act 2000, Schedule 2 clause 11.
[8] See *www.justice.govt.nz/fines/civil-debt-interest-calculator*.